

Feb-22-08 02:28pm From-Buchalter Nemer SF

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T-259 P.002/005 F-637

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Attorneys Specially Appearing for Defendant
 FRESH 'N HEALTHY, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

ASA FARMS, INC., a California
 corporation and BRAGA RANCH,

Plaintiffs,

vs.

FRESH 'N HEALTHY, INC., a Delaware
 corporation, MARK WILLIAMS, an
 individual; JACK PARSON, an individual;
 STEVEN CINELLI, an individual; CHAD
 HAGEN, an individual, SANTOS
 MARTINEZ, an individual; DON BEAM,
 an individual; DARRYL NICHOLSON, an
 individual; RICHARD MAY, an
 individual; THOMAS COLOGNA, an
 individual; PRESTWICK PARTNERS,
 LLC, a California limited liability
 company; SOLSTICE VENTURE
 PARTNERS, LLC, a business entity form
 unknown; VFINANCE INVESTMENTS, a
 business entity form unknown; FMP
 VINEYARD, LLC, a New Mexico limited
 liability company, BUTTONWOOD
 OPTION, LLC, a business entity form
 unknown; DW, LLC, a business entity
 form unknown; M SOLAZZO TRUST
 2002; P. SOLAZZO 1998; GIBBONS
 FAMILY TRUST; BIXLER TRUST;
 STEIGERWALD TRUST and CARTER
 TRUST, and DOES 1 through 50,
 inclusive,

Defendants.

Case No. C08-00122 PVT

**STIPULATION TO MODIFY
 PRELIMINARY INJUNCTION**

(RE: DOCKET NO. 2)

BN 1746173v2

1

STIPULATION TO MODIFY PRELIMINARY INJUNCTION - CASE NO. C08-00122 PVT

Received Time Feb. 22. 2:43PM

1 This Stipulation, made and entered into by and between Plaintiffs ASA Farms, Inc. and
2 Braga Ranch ("Plaintiffs") and Defendant Fresh 'N Healthy, Inc. ("Defendant") is based upon the
3 following facts:

4 A. On or about January 29, 2008 this Court made and entered its Order Granting
5 Plaintiffs' Motion For Preliminary Injunction (the "Order"), which prevents, among other things,
6 Defendant from selling or transferring "any or all assets covered by or subject to the trust
7 provisions of the PACA without agreement of the parties or until further order of this Court."
8 [Order 2:6-11.]

9 B. Order further provides that the assets subject to the Order include all assets of
10 Defendant unless Defendant "can prove that a particular asset" is not subject to the PACA, with
11 the burden of proof on the Defendant.

12 C. Defendant contends, and Plaintiffs reserve their rights with respect to such
13 contentions, that its machinery, fixtures, equipment and intellectual property were purchased with
14 non-PACA assets, including paid in capital and loans from, among others, Comerica Bank.

15 D. Defendant is in default of its obligations to its lender Comerica Bank and has
16 ceased to conduct business. The net realizable value of Defendant's machinery, fixtures,
17 equipment and intellectual property is at risk of diminution due to lack of security, lack of
18 maintenance and the accrual of rents and other storage charges. Defendant desires to sell all or
19 substantially all of its machinery, fixtures, equipment and intellectual property in one or more
20 private sales, as summarized on Exhibit A hereto. Comerica Bank, as secured lender, has
21 consented to such sales of its collateral.

22 E. In order to preserve Plaintiffs' rights, if any, in and to the proceeds of the
23 machinery, fixtures, equipment and intellectual property the parties have agreed to the entry of an
24 order modifying the Order on the terms set forth below.

25 STIPULATION

26 IT IS HEREBY STIPULATED AND AGREED that this Court may make and enter its
27 order as follows:

28 1. Defendant is hereby authorized to sell, in one or more private sales, its machinery,

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1 fixtures, equipment and intellectual property, including labels, packaging and unregistered trade
2 names and trademarks, provided, however, that the proceeds of such sale or sales shall be held in
3 a segregated account at Comerica Bank subject to any and all claims of Plaintiffs, if any, to assert
4 PACA rights thereto.

5 2. Except as expressly set forth, nothing herein contained shall waive, alter or modify
6 the rights of the parties under the Order, and the segregated proceeds shall be subject to Plaintiffs'
7 PACA rights, if any, to the same extent and with the same validity and priority as such rights
8 attached to the machinery, fixtures, equipment and intellectual property itself.

9
10 DATED: February ____, 2008

MURRAY & MURRAY
A Professional Corporation

11
12 By: _____

13 Attorneys Specially Appearing for Defendant
14 FRESH 'N HEALTHY, INC.

15
16 DATED: February 22, 2008

LOMBARDO & GILLES, LLP

17
18 By:  _____

19 Attorneys for Plaintiffs
20 ASA FARMS, INC., and BRAGA RANCH

21 Comerica Bank hereby consents to entry of the foregoing order and agrees to be bound
22 thereby.

23
24 DATED: February 22, 2008

BUCHALTER NEMER
A Professional Corporation

25
26 By:  _____

27 ROBERT E. IZMIRIAN
28 Attorneys for
COMERICA BANK

BN 1746173v2

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9
10 DATED: February 22, 2008

MURRAY & MURRAY
A Professional Corporation

11
12 By: Robert A. Frail

13
14 Attorneys Specially Appearing for Defendant
FRESH 'N HEALTHY, INC.

15
16 DATED: February _____, 2008

LOMBARDO & GILLES, LLP

17
18 By: _____

19 Attorneys for Plaintiffs
20 ASA FARMS, INC., and BRAGA RANCH

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BUCHALTER NEMER
A Professional Corporation

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26 By: _____

ROBERT E. IZMIRIAN
Attorneys for
COMERICA BANK

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EXHIBIT A

Pending sales of assets of Fresh 'N Healthy, Inc.

1. To Ashman Company, substantially all of the equipment, including processing equipment, farm equipment, pumps, irrigation pipes, forklifts, trucks, trailers and warehouse and office furnishings located in Gilroy and El Centro, California, and trade names and labels Gourmet Veg-Paq, Reda Verde, Ruby Ridge Farms, Truly Vegetarian, Salad Select and Tesoro Farms for \$525,000; and

2. To Ray Nava, substantially all of the equipment and vehicles located at Gilroy Machine, for \$60,000.